

**QUARTERLY ATTORNEY REPORT
GENERAL DISTRICT
October 2004**

TO: CRWCD BOARD OF DIRECTORS

FROM: PETER C. FLEMING, GENERAL COUNSEL
JILL C.H. MCCONAUGHY, ASSOCIATE COUNSEL
KIRSTIN M. GILLESPIE, STAFF COUNSEL

Dear Directors:

This report identifies matters for discussion at the River District's October 19-20, 2004, meeting. A separate Confidential Report attached to this report addresses confidential matters. The information in this report is current as of October 8, 2004, and will be supplemented as necessary before or at the Board meeting.

I. EXECUTIVE SESSION

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(b) and 4(e).

- A. C-BT Green Mountain Reservoir/Heeney Slide Update.
- B. Green Mountain Reservoir Administrative Fill.
- C. Denver Blue River Decree Issues.
- D. Shoshone Call Reduction.
- E. Southeastern Colorado Water Conservancy District, Boustead Tunnel Enlargement Cases, PSOP, Twin Lakes Exchange, and Related Matters.
- F. Application of Flattops Water Company, Case No. 03CW159, Water Division 5.
- G. City of Golden v. Simpson, Case No. 03CW176, Water Division 5.
- H. Applications of Natural Energy Resources Company, Case Nos. 04CW119 and 04CW120, Water Division 4.
- I. Colorado River Compact Issues.

II. GENERAL & GOVERNANCE MATTERS

A. Resignation of Jill McConaughy.

It is with substantial regret that I report Jill McConaughy has decided to resign her position as associate counsel for the River District. Over the six and one-half years she worked for the River District, Jill provided excellent advice and advocacy for the district. The entire River District staff will miss working with Jill, both professionally and personally. (I am actively seeking a new Associate Counsel to fill Jill's position).

B. Amendment to Bylaws.

Jill McConaughy has prepared a separate memo to the Board on proposed amendments to the River District's bylaws to conform with the Board's prior direction. The bylaw amendments are set for discussion on the morning of Wednesday, October 20th (agenda item number 19).

C. Approval of Licence Agreement with Homestake Creek Ltd.

The River District owns approximately 105 acres of land in Eagle County near Homestake Creek. Recently, Homestake Creek Ltd. asked the River District if it could irrigate this property with its 2.0 c.f.s Bottolfson Ditch water right in order to maintain the use of its rights. For many years, the River District had a similar arrangement with Jack Elliott, a deceased relative of the current members of Homestake Creek, Ltd., but never reduced the arrangement to writing. We believe an agreement with Homestake Creek Ltd. could benefit the River District because it would provide some regular presence on our property and would formalize the prior arrangement. We therefore propose that the River District enter into a five year License Agreement with Homestake Creek Ltd. that (1) allows Homestake Creek Ltd. to irrigate our property with its 2.0 c.f.s. Bottolfson Ditch water right, (2) allows Homestake Creek Ltd. to keep a few horses and cattle (not to exceed ten total head of livestock) on our property, and (3) requires Homestake Creek Ltd. to remove trash from our property and notify the River District of anything unusual or otherwise of interest occurring on the property. The License Agreement requires Homestake Creek Ltd. to pay the River District \$105.00 per year (approximately 1\$ per acre), allows either party to terminate the Agreement upon written notice to the other party and requires Homestake Creek Ltd. to accept full liability for its actions on the land and indemnify, defend and hold the River District harmless for any and all injuries to itself or third parties caused by its presence and/or actions on our property. A copy of the License Agreement is included in your Board material as Attachment A to this Report.

We recommend the Board approve the License Agreement with Homestake Creek Ltd.

D. Greater Sage-Grouse Work Group Conservation Plan.

The River District's involvement in the studies for the proposed Wolcott Reservoir led to the River District being on a list of parties interested in the recovery of the greater sage-grouse. The facilitator of the work-group has requested that the interested parties sign a statement of support for

the conservation plan. We have review the plan briefly and believe that it contemplates efforts for the long-term management of the greater sage-grouse while protecting recreational, water-development, and agricultural resource values of the Work Group's area of interest (northern Eagle and southern Routt Counties). All of the action items in the plan are carefully drafted to protect water development opportunities. The statement of support merely indicates the voluntary support of the signatories. A copy of the statement of support is included with your Board material as Attachment B to this Report.

We recommend that the Board authorize staff to execute the statement of support. We can provide a copy of the full conservation plan for your review if you wish.

E. Risk Management and Contracting Process – Work with Ralph Grover of Keith and McKuhn.

As the Board is aware, we have been working with Ralph Grover of Keith & McKuhn to review and refine our risk management and contracting procedures. In recent months, Mr. Grover has reviewed the River District's existing engineering contracting practices to determine how the River District currently contracts for engineering services and what risks and benefits are presented by existing practices. Mr. Grover's next task is to work with appropriate staff to determine whether to introduce more formality, such as documenting contracting procedures, into our engineering contracting practices. Mr. Grover also plans to conduct a similar review and recommendation process for other types of River District contracts. Originally, we anticipated Mr. Grover would complete his work in the summer of 2004, but because of scheduling complications, we have extended his contract until December of 2004. Staff will continue working with Mr. Grover and will present his findings and recommendations to the Board at a future meeting.

III. WATER MATTERS BY BASIN

A. Colorado River Basin.

1. C-BT Litigation, Green Mountain Reservoir, Federal District Court.

Special counsel, Anne Castle of Holland & Hart, met recently with counsel for the United States (Reclamation) and the Northern Colorado Water Conservancy District to discuss the scope of informal disclosures and formal discovery with the hope to save all parties time and expense. Those discussions are ongoing. We anticipate that Judge Nottingham will set a Case Management Conference in the near term to establish guidelines for discovery, pre-trial motions, and other pre-trial matters.

The Heeney Slide lawsuit is discussed in the Confidential Report and the Board may wish to discuss the case further in executive session.

2. Green Mountain Reservoir Administrative Fill Issues.

We continue to dedicate substantial time to this complicated and contentious issue regarding the “end of fill” date for Green Mountain Reservoir’s 1935 storage priority. We have met several times with the State Engineer’s large group of interested water users on the subject. The entities attending the meetings include: the State and Division Engineer’s office, the Bureau of Reclamation, Denver, Colorado Springs, Middle Park Water Conservancy District, the major Grand Valley water organizations, Summit County, Northern Colorado Water Conservancy District, Climax (Phelps Dodge), Xcel Energy, Clinton Ditch & Reservoir Company, and City of Golden (Vidler Tunnel Company).

The current focus of the discussions is on Reclamation’s proposal to “split the river” between water allocated to its storage right and water allocated to its direct-flow hydro-power right at Green Mountain Dam that has a co-equal priority with the storage right. The discussions have been helpful to identify some of the many issues but, at present, most parties believe that Reclamation’s proposal does not provide sufficient certainty to any party and may just postpone the fight until the next fill season. We will continue working with the interested parties to seek an acceptable resolution to the issue.

This issue is discussed in the Confidential Report and the Board may wish to discuss it in executive session.

3. Blue River Decree - Negotiations with Denver and Summit County on Blue River Decree Compliance Issues.

This issue is discussed in the Confidential Report and the Board may wish to discuss it in executive session.

4. Shoshone Power Plant - Call Reduction Issues.

Xcel Energy recently submitted a proposed long-term Shoshone call-reduction agreement in outline form. A copy of the proposal is included with your Board material as Attachment C to this Report. In general, the proposal follows the 2003 Shoshone Call Reduction Agreement and the conceptual parameters we have discussed previously with the Board, as well as with Denver, Xcel, and many of the River District’s constituents. Denver has informed us that it rejected Xcel’s proposal because Denver wishes to extend the period of the potential call-reduction into the Winter and Summer seasons. Denver is scheduled to discuss Shoshone issues with the Grand Valley water organizations later this month. We will continue to update the Board on this important issue.

The Board may wish to discuss this issue further in executive session.

5. Southeastern Colorado Water Conservancy District’s Boustead Tunnel Enlargement Cases, PSOP, Twin Lakes Exchange, and Related Matters.

The Boustead Tunnel cases involve claims of Southeastern to make absolute the remaining portion of the 100 c.f.s. first enlargement to the transmountain Boustead Tunnel component of the Fry-Ark Project (Case No. 02CW324) and to adjudicate an absolute right to a 30 c.f.s. second enlargement of the tunnel (Case No. 02CW365), for a total capacity of 1,030 c.f.s. As discussed at the September 16, 2004, Special Joint Meeting, a primary issue of concern associated with these cases is Southeastern's recent claim in various Division 5 water cases that the River District must sequence releases of its Colorado River Water Marketing Supply first from Wolford Mountain Reservoir prior to releases from its Ruedi Reservoir supplies. The River District and its co-objectors, the Basalt Water Conservancy District, the Town of Basalt and the City of Aspen, have been working with Southeastern and the Bureau of Reclamation to resolve these issues, together with the PSOP and Twin Lakes Exchange issues. (As a reminder, David Hallford is representing the River District on the PSOP and Twin Lakes Exchange issues).

At the September 16, 2004 Special Joint Meeting the Board approved a motion stating that the River District will endorse and support the present PSOP legislation, currently H.R. 4691 in the 108th Congress 2nd Session, and substantially similar successor legislation only if and when all of the following conditions are met:

- a. The River District and Colorado Springs Utilities (CSU) execute a Memorandum of Understanding that: a) provides for CSU's first use of its excess space for reuse of transmountain diversions and second use for Arkansas River water; b) requires that CSU-owned Twin Lakes' storage water that is carried over from one water year to the next in excess space, if any, will be counted against Twin Lakes' decreed annual transmountain storage limitations; and c) commits CSU to share its water accounting data with the River District to ensure compliance;
- b. The River District executes a binding agreement with the appropriate parties to resume and ensure the future operation of the Twin Lakes exchange for up to 3,000 acre feet of water on a one to one ratio to provide a meaningful benefit to the West Slope as contemplated by the Operating Principles; and
- c. The River District signs a settlement agreement and stipulation in the Boustead Tunnel cases (Case Nos. 02CW324 & 02CW365, Water Division 5), approved by legal counsel, that includes a provision fully protective of West Slope contractors from the future assertion of the Ruedi Reservoir sequence of release issue raised by Southeastern.

We have been working with all of the parties to resolve these issues, but as of the time of this memo, the conditions of the River District's September 16th motion have not been met. We are very close to resolution of the Boustead Tunnel cases and the Ruedi sequencing issue, but it appears that the Twin Lakes Exchange issue has not moved forward on the same time-frame. In turn, that issue has delayed final resolution of the PSOP issues. The current versions of the Boustead Tunnel

Settlement Documents are included with your Board material as Attachment D to this Report. We anticipate that we will have final settlement documents for the Boustead Tunnel cases and the Ruedi sequencing issue by the Board meeting. It is possible that David Hallford, Eric Kuhn, and Chris Treese may have more to report on the PSOP and Twin Lakes Exchange issues at the Board meeting.

The draft settlement documents are discussed in more detail in the Confidential Memorandum and the Board may wish to discuss this matter in executive session.

6. Application of Flattops Water Company, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.

This case involves the diversion of water from Water Division 6 for use by the Eagle River entities in Water Division 5 to facilitate additional exchanges up the Eagle River. We objected because we want to ensure the decree does not result in an expansion of the amount of water historically diverted out of the Yampa River Basin into the Colorado River Basin and to ensure that the decree includes detailed and accurate accounting provisions. We also have procedural concerns with the application.

We filed our mandatory pre-trial disclosures on September 17, 2004. This case is on the trial track but has not been set for trial, primarily because of the impending retirement of Judge Ossola. The court may set a trial date at the October 20, 2004, trial setting conference but also may decline to set a trial date until the appointment of the new water judge (presumably Chief Judge Peter Craven or the new judge, Daniel Petre). As discussed in the Confidential Report, we have received a proposed stipulation and draft ruling from the applicant. We have submitted comments on the stipulation to the applicant and are waiting on a response.

The Board may wish to discuss this case in executive session.

7. City of Golden (Vidler Tunnel Co.) v. Simpson, Case No. 03CW176, Water Division 5.

This case (1) concerns the right of Golden to divert its junior Vidler Tunnel rights before it fully exercises its senior rights for the tunnel, and (2) raises complicated issues about Golden's ability to divert the Vidler Tunnel rights as against Denver's senior water rights for Dillon Reservoir and the Roberts Tunnel pursuant to a Stipulation and Agreement among the River District, Denver, and Golden's predecessor in interest, the Vidler Tunnel Company, in Case No. 91CW252 (the Denver Substitution Decree). Golden filed a motion for summary judgment on both issues on June 29, 2004, and the motion has been fully briefed by all parties. The River District filed a response to the motion for summary judgment which was joined by the Middle Park Water Conservancy District, the Ute Water Conservancy District, the Orchard Mesa Irrigation District, and the Grand Valley Water Users Association. A copy of the response is included in your Board material as Attachment E to this Report. In the response, we argued that the court should deny the motion

because the parties that intervened in May have not had an opportunity to discover essential facts and Golden did not demonstrate that its proposed method of operation would not injure other water users. We are waiting for a ruling from the court.

8. Bluestone Water Conservancy District - Kobe Pipeline Project.

We continue to work with Chevron and the Bluestone Water Conservancy District on an Agreement to design and construct a portion of the proposed Kobe Pipeline System to pump water from the Colorado River upstream to Roan Creek under a portion of the Kobe Canal water right, which the River District and Bluestone previously leased to Chevron. The Board approved the Agreement in concept at the June Board meeting, and we had a subsequent meeting with Chevron and directors of the Bluestone District to negotiate certain details of the Agreement. We are waiting to receive a revised draft Agreement from Bluestone's attorney.

9. River District's Diligence Application, Case No. 03CW41, Water Division 5.

We filed this diligence application on over 45 water rights at the end of February 2003. We have stipulated with MidCon Realty. We have not been able to reach any agreement with the two pro se objectors because it has been difficult to get them to respond at all. We believe that the Referee will give them a bit more leeway in responding but will not let the case linger indefinitely.

We also have worked with the Division Engineer to resolve the issues raised in the summary of consultation. As a result, we filed an amendment to the Application in August to: (1) correct clerical errors in some of the legal descriptions contained in the original application; (2) clarify the source of water for the Iron Mountain Reservoir 2nd Fill water right; and (3) clarify the source of water and decreed uses for the Pando Feeder Canal water right to make the application consistent with the change decree entered in Case No. 97CW288. The period for filing statements of opposition to the amended application will expire on October 31, 2004. If no new statements of opposition are filed, we will request that the referee enter our proposed ruling despite the failure of the pro se parties to engage in any discussions to resolve their concerns. If that effort fails, we will have to re-refer the case to the water judge.

B. Yampa and White River Basins.

1. Application of Flattops Water Company, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.

This case was filed in Water Division 5 but it also concerns water diverted from Water Division 6. Please see the discussion in paragraph 6, above, regarding this matter, as well as the discussion in the Confidential Report.

2. CRWCD Diligence Application, Case No. 04CW27, Water Division 6.

We filed this diligence application on over 20 water rights associated with the Great Northern, Juniper-Cross, and Savery-Pot Hook Projects at the end of June 2004. We received statements of opposition from the Upper Yampa Water Conservancy District ("UYWCD") and the City of Steamboat Springs. The UYWCD filed solely to monitor compliance with the terms of an existing Settlement Agreement related to the Juniper Project, which prohibits UYWCD from opposing the River District's future diligence applications for these projects. The statement of opposition filed by Steamboat Springs asserts that the application could injure its water rights and that the River District must be held to strict proof concerning all elements of the application. We are going to have to re-refer the case to the Water Judge because of Dan Birch's position as Water Referee. We will keep the Board informed of the progress of this case.

C. Gunnison River Basin.

1. Black Canyon Litigation.

a. Reserved Rights Application, Case No. 01CW05, Water Division 4 and Case No. 03SA321, Colorado Supreme Court.

As discussed at previous Board meetings, the River District and other parties, including the CWCB, State Engineer, Colorado River Energy Distributors Association ("CREDA"), and the Upper Gunnison River Water Conservancy District, filed a petition with the Colorado Supreme Court that requests the court to reverse the water court's order staying the proceedings in the reserved rights quantification, Case No. 01CW05. The supreme court still has not ruled on the petition but we expect a ruling soon.

b. Federal Complaint of Environmental Groups, Case No. 03-WY-1712.

We previously reported that Judge Brimmer denied the United States' motion to dismiss the federal lawsuit brought by certain environmental groups challenging the April 3, 2003, Settlement Agreement on the Black Canyon National Park reserved water right between the United States and Colorado. In June, the environmental groups voluntarily dismissed their first claim for relief because the claim was largely predicated on a Tenth Circuit case that the U.S. Supreme Court recently overruled.

Currently, the parties are in the process of filing the administrative record with the court. The United States filed approximately 1,400 pages with the court and the State and water user defendants thereafter requested the United States supplement the record with certain historical documents. The State and water user defendants expect that the United States will file a motion to supplement the administrative record with the requested documents after the court addresses numerous motions filed by the environmental groups relating directly or indirectly to the composition of the administrative record (these motions include: (1) a motion to require production of documents referenced in the record but omitted from the record or submitted in incomplete or redacted form; (2) a motion for leave to serve discovery requests upon the State and water user

defendants and to supplement the record with any documents produced in response thereto; and (3) a motion to allow consideration of expert testimony by environmental plaintiffs as a supplement to the administrative record and entry of an order scheduling expert disclosures and deadlines). The motions are being briefed. In addition, the United States and the environmental groups have filed a joint pleading to request that the court resolve the environmental groups' pending motions before conducting any further trial scheduling. We will continue to monitor this case, especially as it relates to the other Black Canyon proceedings.

c. CWCB Appropriation of Peak Instream Flow for the Black Canyon, Case No. 03CW265, Water Division 4.

The only development to report in this matter is that we received a copy of the Summary of Consultation from the Division Engineer of Water Division No. 4 stating that the CWCB's claimed instream flow water right can be administered without injury to vested water rights and existing contracts but that administration of the right will require accurate accounting.

It is possible that a ruling may be entered by the Colorado Supreme Court or the federal district court prior to the Board meeting, and the Board may wish to discuss the ramifications of any such ruling or order in executive session.

2. CWCB's Appeal of Upper Gunnison River Water Conservancy District RICD Decree, Case No. 02CW38, Water Division 4, to the Colorado Supreme Court, Case No. 04SA44.

The State's appeal of the Division 4 Water Court's Order granting the UGRWCD's application for an RICD on the Gunnison River will be fully briefed by the Board meeting. You each should have received a copy of the River District's answer brief. Several entities filed briefs as *amici curiae* in support of the State, including the Rio Grande Water Conservation District; the Southwestern Water Conservation District; the City and County of Denver; the Southeastern Colorado Water Conservancy District; the Upper Yampa Water Conservancy District; the Towns of Oak Creek and Yampa; the Colorado Farm Bureau; and the City of Aurora. The entities filing *amici curiae* briefs in support of the UGRWCD were the Cities of Steamboat Springs, Pueblo, and Golden; the Towns of Vail, Breckenridge, and Minturn; the Counties of Grand, Gunnison, and Pitkin; the Northwest Colorado Council of Governments; Vail Resorts; the Upper Eagle Regional Water Authority; the Eagle River Water and Sanitation District; and the Colorado White Water Association.

3. Application of United States, Bureau of Reclamation for Taylor Park Reservoir Exchange, Case No. 90CW164, Water Division 4.

We met recently with the United States and other interested parties to discuss how to best proceed with this long-pending case. We will provide comments to the United States on its

proposed decree in the near term. The case will proceed in the negotiation stage for the near term and it is hoped that a consent decree can be reached with all parties.

4. Aspinall Unit EIS Process.

The River District has been granted cooperating agency status on the Aspinall Unit NEPA process initiated by the USBR. The first meeting is supposed to be scheduled to take place in November.

5. Natural Energy Resources Company's Change Application for Union Park Reservoir, Case No. 04CW119, and Diligence Application for Union Park Reservoir, Case No. 04CW120, Water Division 4.

These cases were filed by the Natural Energy Resources Company ("NECO") in July, and request a finding of reasonable diligence for Union Park Reservoir and approval of a change (of approximately 2,000 feet) in the location of Union Park Dam and the point of diversion on Lottis Creek. We filed statements of opposition, along with several other parties, including the Upper Gunnison River Water Conservancy District, the City of Gunnison, the Crystal Creek Homeowners Association, the High Country Citizens' Alliance, and the United States. A copy of the River District's statements of opposition are included with your Board material as Attachment F to this Report. On October 1st, the Upper Gunnison District filed motions to re-refer each case to the Water Judge. The cases will be at issue 90 days following the order of re-referral and will proceed toward trial on a faster track than if the cases remained before the Water Referee.

We recommend that the Board ratify the River District's statements of opposition. The Board may wish to discuss the cases in executive session.

D. South Platte River Basin.

1. Draft EIS on Platte River Endangered Species.

We worked with River District staff to draft and file comments in September on the joint draft Programmatic Environmental Impact Statement for the Platte River endangered species. The comments primarily expressed concern about the preferred alternative that establishes a baseline of water depletions of 1997, and categorizes the use of reusable return flow on the Front Range in excess of the 1997 baseline amount as a depletion that would count against Colorado's depletion allowance. Once the depletion allowance is exhausted, any reuse of reusable supplies would require additional ESA compliance. We believe this puts too much emphasis on reusable water supplies (including underutilized transmountain return flow) to solve the Platte River ESA issues.

IV. Colorado River Compact Matters.

The potential of a Colorado River Compact call from the lower basin states in the foreseeable future continues to be a very hot topic. We continue to meet with several different (but overlapping) groups of interested parties to devise strategies to best protect the State of Colorado, including the Upper Colorado River Commission Legal and Engineering Committee, the Lochhead Coalition, and a group called together by Russell George, the Director of the Colorado Department of Natural Resources.

The Board may wish to discuss this matter in executive session.

Attachments:

Confidential Report from P. Fleming, October 8, 2004 (attached to the General Report)

- A. License Agreement with Homestake Creek Ltd., draft dated October 6, 2004
- B. Private Sector Statement of Support for Greater Sage-Grouse Conservation Plan
- C. Outline of Shoshone Call Relaxation Proposal
- D. Settlement Documents in Boustead Tunnel Enlargement Cases
 - (1) Draft Settlement Agreement between the River District and Southeastern, dated October 7, 2004
 - (2) Stipulation in Case Nos. 02CW324 and 02CW365, Water Division 5, dated October 1, 2004
 - (3) Consent Decree in Case No. 02CW324, Water Division 5, dated October 7, 2004
- E. CRWCD's Response to Motion for Summary Judgment, Case No. 03CW176, Water Division 5, dated August 2, 2004
- F. CRWCD's Statements of Opposition in Case Nos. 04CW119 & 04CW120, Water Division 4, dated September 27, 2004